No. 6771

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF AND ARGUMENT FOR APPELLANT.

GEO. J. HATFIELD,
United States Attorney,

L. E. KILKENNY,
Assistant United States Attorney,

JAMES O. TOLBERT,
Special Assistant to
United States Attorney,

Attorneys for Appellant.

Parker Printing Company, 545 Sansome Street, San Francisco

Subject Index

Cases Cited

*Copies of the unreported opinion have been filed with the clerk of this court.

No. 6771.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF AND ARGUMENT FOR APPELLANT.

A.

STATEMENT OF THE CASE.

This case involves five alleged violations of the Safety Appliance Acts, Title 45, U. S. Code, Chapter 1, Sections 1 to 9, and an Order of the Interstate Commerce Commission issued pursuant to Section 9 of the said chapter, which order reads as follows:

> "IT IS ORDERED, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Acts as amended March 2, 1903, any train is operated with power or train brakes, not less

> than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

On November 10, 11, 12 and 13, 1930, appellee made five transfer movements of cars between the Mission Bay unit and the Sixth Street unit of defendant's general yard at San Francisco, these transfers consisting of ten, twenty-six, twenty, eight and thirteen cars, respectively, exclusive of locomotive and tender. In each instance the air brakes on the cars were not under the control of the engineman, due to the air hose between the locomotive and cars being disconnected (Tr. pp. 24, 43-45).

On the plat used at the trial of this case and made a part of the record the Mission Bay unit is marked "A" and the Sixth Street unit is marked "B"; the green line shows the track connecting these two units which was used in making the five transfers here under consideration. The track shown by the green line is what is known in railroad parlance as a "drill" track, over which switch engines operate between "A" and "B", and is also used when necessary to switch cars into either "A" or "B". This track is not used by road trains.

The distance between "A" and "B" is approximately 4,000 feet (Tr. p. 25), on the green line, and when to that is added the distance traveled before

reaching the green line or after leaving it, the distance traveled by these transfers was something over a mile (Tr. p. 43). In making the trips between "A" and "B" eight public streets are crossed at grade (Tr. pp. 25, 46), five or six of which are protected by crossing watchmen during daylight hours (Tr. pp. 25, 43).

In none of the five transfer movements was any car picked up or set out en route, and in each instance the transfer moved as a unit, the switching necessary in making up or breaking up of these transfers being done before the movements began or after their completion. Two of the five movements were made by the locomotives pushing the cars. All of the movements were made wholly within yard limits, by yard engines and yard crews and under the direction of the yardmaster (Tr. pp. 25, 56).

B.

ASSIGNMENT OF ERRORS.

I.

The Court erred in overruling plaintiff's objections to the following question asked of the witness Hopkins by counsel for defendant and in permitting said witness to reply thereto, to which action of the Court plaintiff then and there duly excepted:

> "Q. Will you state from your experience as an operating man, and your observation of the

operation here complained of, whether the handling of drags of cars, as you have described them, on the green line without coupling air, and as described by the two witnesses for the plaintiff, is a safe or unsafe operation?

A. I would consider moving at the slow speed that we have to move in this territory between the two units, that the measure of safety would be greater without air through the cars than it would be with air."

Assignment of Errors II to XI, both inclusive, relate to the refusal of the Court to enter judgment in favor of the Government and in entering judgment in favor of the defendant in each of the five causes of action.

C.

QUESTION INVOLVED.

The sole question involved in this case is whether the five transfer movements were train movements within the meaning of the power-brake provisions of the Safety Appliance Acts, or whether they were mere switching movements.

D.

ARGUMENT.

In this brief the last ten assignments of error will be considered as a whole for they all relate to the

same question as to each cause of action, and will be taken up first. The first assignment of error having to do with the admission of certain testimony will be dealt with last.

I.

THE MOVEMENT IN THIS CASE WAS A TRAIN MOVEMENT AND CONSEQUENTLY THE FAILURE TO USE AIR BRAKES ON CARS WAS A VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACT.

There is no serious dispute as to the facts, the whole case hinging upon whether the movements were train movements or mere switching movements. If they were train movements, the law was violated; if they were mere switching movements, the law was not violated. As construed by the various courts the air brake provisions of the law apply to transfer trains as well as road trains. In the instant case the transfer movements were from one distinct point in appellee's yard in San Francisco where there were numerous tracks and switches, over a single lead track, to another distinct point where there were also numerous tracks and switches. Between these two points no switching was done, but before the movements began and after their completion, the cars were switched to various tracks. What was done in either "A" or "B" is not involved herein, this case being based solely on the movement of these strings of cars between "A" and "B" for a distance of approximately a mile, during which not a single car was switched out of or switched into the strings of cars (Tr. pp. 42-45).

Among the early decisions on the question of the application of the air brake law to transfer trains is that of *U. S. v. Erie R. Co.,* 237 U. S. 402, wherein transfer movements of cars in charge of switching crews were made by switching locomotives from one yard to another for a distance of 2 to 3½ miles, over main line track. The Supreme Court in holding that such movements were train movements said:

> "It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains, and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations, and so are not within the air-brake provision."

While the *Erie* case just cited differs from the case at bar in that the movement was for a greater distance and some main track was used, it is similar to the instant case in that there was no picking up or setting out of cars en route, such work having been done before the movements began and after their completion.

The Supreme Court again considered this question in *Louisville & Jeffersonville B. Co. v. U. S.,* 249 U. S. 534, which involved a transfer movement of a locomotive and 26 cars for a distance of three-quarters of a mile, a part of which was over main line track for delivery to another carrier. The Court said:

> "An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a 'train of cars,' but would certainly be so designated by men in general and in any fair acceptation of the term must be regarded as constituting a train within the meaning of the statute. It was a train greater in length than most regularly scheduled trains were when the Safety Appliance Act was passed twenty-six years ago, and even yet, probably exceeds in length, passenger and freight trains considered, more than a majority of the regular road trains in this country.
>
> *The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it can not, therefore, with propriety be called a switching movement."*

In the case at bar the movements were not a "sorting, or selecting, or classifying" of cars involving coupling and uncoupling, but was the transfer of cuts

of cars as a unit from "A" to "B" for a distance of about a mile without uncoupling, coupling or switching out a single car.

This question again came before the Supreme Court in *U. S. v. Northern Pac. Co.,* 254 U. S. 251. This case was based on transfer movements for a distance of 4 miles without the required percentage of air brakes in operation. The contention was made by the defendant that the provisions of the Safety Appliance Acts did not apply because the movements were not over a part of a main line; that neither passenger nor freight trains, through or local, moved over that part of the track and that the movements were not controlled by time tables, train orders, or time cards. On the other hand, it was contended that the rules required all trains to move at such speed that they could be stopped at vision and that all trains were under the control of the yardmaster's orders. In passing on that case the Supreme Court used the following language:

> "* * * If use of the road as part of a main line were essential in order that operations on it be controlled by the Safety Appliance Act, the requirement would be satisfied in this case by the fact that two independent companies use the road for freight trains under air control and that the passenger trains of another company cross it. 'Not only were these (the defendant's) trains subject to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check

> or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect.' United States v. Chicago, Etc., Ry., supra. *But there is nothing in the Act which limits the application of the provision here in question to operations on main-line tracks.* The requirements that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. 943) applicable to 'all trains * * * used on any railroad engaged in interstate commerce.' It is admitted that this railroad is engaged in interstate commerce; and the cases cited show that transfer trains, like those here involved, are 'trains' within the meaning of the Act. *A moving locomotive with cars attached is without the provision of the Act only when it is not a train; as where the operation is that of switching, classifying, and assembling cars within railroad yards for the purpose of making up trains.''*

The Circuit Court of Appeals for the Eighth Circuit also passed upon the question in the case of *Great Northern v. U. S.* (C. C. A. 8th), 288 Fed. 190. The facts are clearly set forth in the opinion and are quoted below:

> "Within the general terminal yards of plaintiff in error at Minneapolis there are a number of apparently smaller yards or units designated as 'P' yard, 'O' yard, 'M' yard, 'N' yard, and others. According to the testimony of the train master of the Terminals Division, St. Paul to Hutchinson, each of these yards is a separate unit. The twenty-four cars here involved had been bunched on

> Track No. 6 in the 'P' yard. They were pushed by an engine from this point to a point west of Lyndale Avenue Bridge known as the 'Hay' yard north of the main tracks. To reach this place they moved east from the 'P' yard; crossed the east line main track to the west line main track, and proceeded east on this track to the lead at the 'Hay' yard where the cars were distributed to certain industries and delivery tracks. The distance moved was about 4,800 feet and the movement was continuous from the 'P' yard to the 'Hay' yard. It was not a mere switching operation, but was a transfer movement of twenty-four cars from one distinct entity known as 'P' yard to another entity known as the 'Hay' yard."

In holding that this was a train movement and not a mere switching operation, this Court said:

> "The switching, as distinguished from train movement, was after the cars had reached the 'Hay' yard, or lead track there. In moving the cars down the main track they were exposed to hazards themselves and exposed other trains operating on the main line to hazards which made essential the appliances for quickly stopping, and such is the very purpose of the Act. *The mere fact that the Railroad Company designates a large stretch or track as yard does not make every operation therein a switching operation. If so, the Act could be avoided by including large areas in the term yard.* These cars, so operated, constituted a train within the purview of Section 8605, U. S. Statutes, and under the Order of the Inter-

> state Commerce Commission made in pursuance of the Statutes eighty-five per cent of such train must be so equipped with power or train brakes that the engineer can control the speed without requiring brakemen to use the common hand brakes. This train was not so equipped, and the case falls within the doctrines announced in U. S. v. Erie R. R. Co., 237 U. S. 402; U. S. v. C. B. & Q. R. R. Co., 237 U. S. 410; U. S. v. Northern Pac. Ry. Co., 254 U. S. 251; Louisville & Jeffersonville Bridge Co. v. U. S., 249 U. S. 534; U. S. v. Galveston, H. & H. R. Co., 255 Fed. 755."

While the subdivisions of the general yard at Minneapolis were given specific designations they were as much a part of the general yard as "A" and "B" are in the instant case.

In *Illinois Central R. Co. v. U. S.* (C. C. A. 8th), 14 F. (2) 747, the Circuit Court of Appeals for the Eighth Circuit had occasion to pass upon the question in a case almost identical with the one at bar. In that case there were two subdivisions within defendant's Grace Street yard, Omaha, located 4,500 feet apart and connected by a running track as in the instant case. The 18 cars were assembled in one of the subdivisions and pushed to the freight house where the cars were set out for unloading. The running track over which these cars were moved was never used for regular scheduled trains, and was used wholly for movements similar to the one involved in that case. The defendant maintained that this was a movement

wholly within the Grace Street yard, that they did not recognize any subdivision within that yard, and that the movement was merely a switching movement and not subject to the air-brake provisions of the Safety Appliance Acts. The Court in deciding the case used the following language:

> "Applying these authorities to the case at bar, we are persuaded that this movement was essentially a train movement. The first switching operation had been completed. The remaining cars were reassembled and passed as a unit along a single track for a considerable distance. No switching operations were undertaken until another set of switching tracks was reached. The streets of a busy city and tracks of other railroads were crossed at grade, and there was ever present the probability that the train might, at any time, have to be stopped suddenly to avoid an accident. This could not be done without the use of train brakes. There was a serious danger not only to the crew of this particular train, but to the public as well, which it was the object of the law to minimize as far as possible.
>
> The fact that the whole operation was within what the railroad chose to call and operate as one yard is not controlling. As we have already shown, the so-called Grace Street yard was divided into two sets of switching tracks, a considerable distance apart, and connected by a single lead track, from which the public was not excluded. This part of the yard, at least, was used by other railroads, and was not the private property of the plaintiff in error."

The same Circuit Court of Appeals had occasion to pass on this question again in a case involving almost the identical facts, and held that the movements referred to therein were train movements (*Chicago St. P. M. & O. v. U. S.* (C. C. A. 8th), 36 F. (2) 670).

In *Chicago & E. R. Co. v. U. S.* (C. C. A. 7th), 22 F. (2) 729, decided by the Circuit Court of Appeals for the Seventh Circuit, a train had arrived in the yard, was broken up and the cars distributed, when 28 cars remained for movement to another section of the yard, referred to as Section C, for further switching. These 28 cars then moved over main line track for 1,500 feet and then an additional 2,850 feet after entering Section C. The movement of these 28 cars was held to constitute a train movement requiring the use of power brakes.

In *Great Northern Ry. Co. v. U. S.,* decided by this Court and reported in 297 Fed. 692, the carrier operated a transfer at Wenatchee, Wash., without the required percentage of power brakes. The railroad yard at Wenatchee consists of two portions referred to as the west or Old yard and the east or Apple yard, connected by a main track and a westbound lead or switching lead used for switching cars back and forth between the two portions of the yard. This switching lead was also used for moving westbound through freight trains. The east or Apple yard was used for making up freight trains, and the west or Old yard was used for switching to various industries located

adjacent thereto and for storing and icing cars. There is also an industry track known as the alley track over which various industries are served. The six cars making up the transfer train were taken out of a freight train in the east or Apple yard and hauled by a "switch" engine with a "switch" foreman and "switching" crew and proceeded over the westbound lead track to the Old or west yard, 8,000 feet distant. In making this movement the train entered the east yard and proceeded to the freight depot, some 1,500 feet from the east entrance of the west yard where a freight car was set out; the locomotive and remaining five cars proceeded about 3,600 feet westerly from the freight depot and set out another car on a spur track; the locomotive and remaining four cars then proceeded to the west yard where another car was set out; the locomotive and remaining cars then proceeded eastwardly over the switching lead, connecting the east and west yards, to a junction of the lead track with the alley track and back down the alley track to a point where another car was set out, after which the movement continued east and another car set out. In making this movement the main line track was crossed three times and some public streets were crossed at grade.

The carrier contended that the movements between the two yards were governed by yard rules and that it was necessary to switch many of the cars from one to five or more times, and that unless great expedition

was used, injury to the shipping public would follow. The Court said:

> "Applied to the facts in the present case, the rule of the decisions cited lead us to hold that the Railway Company was not moving cars about in a yard or on tracks set apart for switching operations at Wenatchee, but moved the train between two yards over a considerable stretch of main line, and that unless the engineer could readily and quickly check or control the movements of the trains they were exposed to hazards which the statute covered, and they also became a danger to the safety of other trains which the statute was equally designed to protect."

In *U. S. v. Northern Pacific Railway* (C. C. A. 9th), 54 F. (2) 573, decided by this Court on December 18, 1931, the facts as set forth in the Court's opinion and its conclusions thereon are as follows:

> "* * * The alleged violation described in the first count of the complaint occurred as follows: A switch engine was coupled head on to a string of five cars, which had been left standing on the side tracks in the vicinity of the depot, and pushed these cars out easterly onto the main line track. It proceeded along the main line track for a distance of somewhat over one-half mile. There it shunted four of the cars onto a switch or spur at what is called Wilson's Mill. The engine backed out with one car and proceeded a distance of a few hundred feet to another siding, which it backed into with the single car to allow a regular train to pass on the main line. It then proceeded

with the one car southeasterly along the main track for a distance of slightly over one mile, where it set out on a spur the single car, and took two loaded oil cars for a return trip. It stopped at the Wilson spur and there switched the four cars previously left by it to spurs at as many different industrial establishments in the immediate neighborhood of the Wilson spur. It then returned to the depot yards along the main line track with the two loaded oil cars.

The outgoing and return movements, ending at the depot yards, are the subject of the first count. Similar movements on the day following are made the subject of the second count. During the movements described, none of the brakes on the cars were connected with power under the control of the engineer.

The track over which the movements were executed crossed several city streets used by pedestrians and vehicles. For at least one-third of a mile, the main line used ran through the center of Wishkah Street, which was the main highway for automobile traffic between Tacoma and Hoquiam.

We are of the opinion that the movements complained of were train movements and subject to the requirements of the Safety Appliance Acts. They were in no sense switching movements within the railroad yards where trains were assembled or broken up. As was said by Justice Brandeis, in United States v. Northern Pacific Ry. Co., 254 U. S. 251:

> 'A moving locomotive with cars attached is without the provision of the act only when it is

> not a train; as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains.'
>
> In the transfer of cars from railroad yards to nearby points or to other yards of a railroad company, where the main line is traversed for substantial distances, the railroad company is not authorized to claim that the movement is merely one of switching which will fall without the provisions of the act."

In the court below the carrier made much of the fact that the "drill" track over which the questioned movements were made was used for switching purposes and was not used at all for road trains. It is the Government's contention that the character of the track used has no bearing on whether a given movement is a train movement or a switching movement, and that the sole test is *what was done during the particular movement in question.* This contention is supported by the Supreme Court in the *Northern Pacific* case, supra. It is quite conceivable that there may be a switching movement on a main line track, where, for example, it should become necessary to break up or make up a train on such track. Manifestly if there was a movement of cars which in every other respect would constitute a train movement, and such cars should move over a track set aside for switching, it could not be said that the mere fact that the movement was made over such tracks would change the character of the movement from a train

movement to a switching movement. There is no indication in the Safety Appliance Acts that Congress intended to limit the application of the air brake law to main line movements.

It can not be too emphatically stated that the character of the track has no bearing on the question; switching may be done over a main line no less than over a switching track or lead; and vice versa a train movement may be made over a switching lead as over any other kind of track.

Where there is a continuous movement of cars as a unit for a mile or more without any cars being switched in or out during the course of such movement, it is submitted that such operation constitutes a train movement, irrespective of the character of the track, designation of crew or locomotive, or the rules under which movement is made.

In *U. S. v. Northern Pac. Co.,* No. 12213, unreported, decided by Judge Neterer for the Western District of Washington on December 1, 1928, the question involved was whether strings of 10 to 17 cars, hauled approximately a mile and a half along the waterfront of Seattle were train movements or switching movements. In holding that these were train movements, Judge Neterer said:

> "The distinction between 'train movements' and 'switching' is not whether it involves the use of the main line of defendant or other companies. There may be train movements on a spur track. Switching precedes or follows train movements. A switch

is a movable part of a rail or of opposite rail for transferring cars from one track to another. A train is a continuous or connected line of cars on a railroad. D. C. Ry. Co. v. Mills, 48 N. W. 1007. An engine with cars attached, pushed on a railroad track, is a train. Dacey v. Old Col. R. Co., 26 N. E. 437. The only purpose of these citations is to confirm elementary definitions.

It is apparent, I think, from the record, that the units formed by assembling and coupling together of the engine and cars at Second Avenue and transporting 14 cars to the middle yard is a complete transaction as fully as though the movement had extended to a more distant point. The unit was not broken up. No cars were out from or added to the unit en route. The switching operations in making up the unit before the movement or afterwards had no relation to the movement of the engine and connected line of cars over the railroad to its destination, and this has application to the movements in the several causes of action. Pier 8 to middle yard, 18 cars, is a greater distance and a longer train than Second Avenue to middle yard, 14 cars, as is also middle yard to Pier 5, 17 cars, but the relation of the act of transportation is not different.

For many purposes the entire switching ground of the defendant may be considered as one yard, and the designation of the different yards merely a matter of convenience to the defendant; but when a completed unit is formed at one yard and transported in its entirety to another point over the streets, highways, and railways a mile or more distant, it takes on a different relation; and since

> the statute makes no exception the courts must follow the plain terms of its provisions, and as said by the Circuit Court of Appeals in Great Northern Ry. v. United States, 297 Fed. 692, the court must follow the letter and spirit of the statute. The fact that the defendant has by careful operations avoided casualties inspires commendation but does not exempt it from the act."

Summarizing the holdings of the cases cited, it clearly appears that the following principles have been definitely and clearly established by the courts:

1. There is nothing in the Federal Safety Appliance Act which limits its application to operations on main line tracks.

The character of the track, whether main line or otherwise, is not controlling.

U. S. v. North. Pac. Co., 254 U. S. 251;
Illinois Cent. R. v. U. S. (C. C. A. 8th), 14 F. (2d) 747;
Chicago & E. R. Co. v. U. S. (C. C. A. 7th), 22 F. (2d) 729;
Chicago St. P. M. & O. v. U. S. (C. C. A. 8th), 36 F. (2d) 670;
U. S. v. Northern Pac. Co. (C. C. A. 9th), 54 F. (2d) 573,

Switching may be done on a main line; and there may be train movements on spur tracks.

U. S. v. North. Pac. Co., No. 12213, unreported.

2. A movement for a considerable distance of a number of cars as a unit without uncoupling or

switching out a single car and which movement is not a sorting, or selecting or a classifying of the cars is not a switching movement.

Louisville & J. Br. v. U. S., 249 U. S. 534.

3. The fact that an assemblage of cars is transferred by an operation at vision without time tables or block signals, with a switching engine, and a yard crew does not make such transfer a switching movement.

U. S. v. Northern Pac. Co., 254 U. S. 251;

Chicago, St. P. M. & O. v. U. S. (C. C. A. 8th), 36 F. (2d) 670;

Illinois Cent. R. v. U. S. (C. C. A. 8th), 14 F. (2d) 747;

Chicago & E. R. Co. v. U. S. (C. C. A. 7th), 22 F. (2d) 729.

4. The mere fact that a railroad company designates a large stretch or tract as a *yard* does not make every operation thereon a switching operation.

Movements of cars between parts of the same yard, as a unit, no cars being set out or picked up, switching and classifying being done before starting from one part of the yard or after arrival at another part, is a train movement and not a switching movement.

Great Northern v. U. S. (C. C. A. 8th), 288 Fed. 190;

Chicago, St. P. M. & O. v. U. S. (C. C. A. 8th), 36 F. (2d) 670;

Illinois Cent. R. v. U. S. (C. C. A. 8th), 14 F. (2d) 747;
Chicago & E. R. Co. v. U. S. (C. C. A. 7th), 22 F. (2d) 729.

5. The controlling test of the statute's application lies in the *essential nature of the work done* rather than in the names applied to those engaged in it.

U. S. v. C. B. & Q. R. Co., 237 U. S. 410.

While the Southern Pacific Company, for operating reasons, has chosen to include the San Francisco terminals in one yard under the control of one general yardmaster (Tr. p. 73), it is apparent that the network of tracks at the points marked "A" and "B" on the plat were subdivisions within the general yard connected by a single running track over which these transfers moved. A reference to the plat makes it difficult to arrive at any other conclusion than that there is a distinct yard at "A" and another one at "B".

In any event, whether or not there is one or more yards at San Francisco is immaterial, for the sole question is whether the movements complained of were trains or mere switching operations. To make the application of the law depend upon whether the movement was wholly within the yard would place in the hands of the carrier the power to restrict the application of the law by further extending the boundaries of their yard.

In the case of *U. S. v. C. B. & Q.*, 237 U. S. 410, the Supreme Court, in passing upon another case involving the air brake law, said that:

> *"the controlling test of the statute's application lies in the essential nature of the work performed rather than the names applied to those engaged in it."*

It seems obvious that the movements here under discussion, which were made as a unit from one distinct point to another for a distance of over a mile, are train movements irrespective of what the carrier chooses to designate them for operating purposes.

These transfer movements crossed at grade several streets which were used by various kinds of traffic. Having in mind that the purpose of the Safety Appliance Acts is to promote safety to employees and the traveling public, it is hard to imagine a situation where it is more necessary that the enginemen have such control of these transfer movements as to bring them to a stop in order to avoid accidents. This is a busy yard and safety demands that the trains be so equipped as to make it possible for enginemen to bring them to a stop in the least possible space of time and distance.

II.

THE LOWER COURT ERRED IN ADMITTING TESTIMONY AS TO RELATIVE SAFETY IN OPERATING THE TRANSFER MOVEMENT WITH OR WITHOUT USE OF AIR BRAKES ON THE CARS.

With respect to the first assignment of error relating to the admission of testimony as to the greater degree of safety in operating these transfer movements without the use of air brakes than with such use, the Supreme Court, in the *Louisville & Jeffersonville Bridge* case, supra, said, page 539:

> "* * * But the construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply and that failure to comply will not be excused by carefulness to avoid the danger which the appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act."

In the same connection that court also said, in the *Northern Pacific* case, supra, 254 U. S. 251, 255:

> "* * * Congress has not imposed upon courts applying the Act any duty to weigh the dangers

> incident to particular operations; and we have no occasion to consider the special dangers incident to operating trains under the conditions here presented."

From the foregoing citations it is evident that the admission of the testimony objected to was clearly inadmissible, and it was therefore error to permit the question to be answered. In addition the introduction of such testimony tends to becloud the issue and should for that reason have been excluded.

While not a part of the record, it is a circumstance of which this Court might well take judicial notice that on certain occasions San Francisco is enveloped in a dense fog that makes all kinds of traffic hazardous, particularly railroading. In *U. S. v. Chicago, B. & Q. Ry.,* 237 U. S. 410, 412, the Court said:

> "* * * And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect."

Irrespective of what some particular witnesses might say to the contrary, it requires no stretch of the imagination to see that a transfer movement of, say, 20 cars can be brought to a stop more readily and easily with the power brakes in use on every vehicle in the transfer than can be done with the brakes applied on the head end only, for such limited appli-

cation would in case of emergency allow the cars behind to continue onward and bump into the locomotive, and thus prolong the retardation of the speed of the entire train or unit. To argue otherwise is akin to saying that the motorist is as safe with 2-wheel brakes as with 4-wheel brakes. It is not an exaggeration to say that many conditions might arise where the variation of the stopping time of a transfer movement might mean the difference between safety or a serious accident. All of the cars involved were equipped with air brakes and all that would have been required to have all of the air brakes under the control of the engineer was to couple the air hose between the various cars and the locomotive.

CONCLUSION.

Wherefore, it is respectfully submitted that the judgment should be reversed.

GEO. J. HATFIELD,
United States Attorney,

L. E. KILKENNY,
Assistant United States Attorney,

JAMES O. TOLBERT,
Special Assistant to
United States Attorney,
Attorneys for Appellant.